COMMONWEALTH OF MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

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Massachusetts Oilheat Council, Inc. and) D.T.E. 00-57

Massachusetts Alliance for Fair Competition)

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REPLY MEMORANDUM OF BOSTON GAS COMPANY, COLONIAL GAS COMPANY AND ESSEX GAS COMPANY IN SUPPORT OF

MOTION TO DISMISS

I. INTRODUCTION

On June 29, 2000, the Massachusetts Oilheat Council and the Massachusetts Alliance for Fair Competition (together, the "Petitioners") filed a complaint and petition (the "Complaint and Petition") with the Department of Telecommunications and Energy (the "Department") alleging that Boston Gas Company's, Colonial Gas Company's and Essex Gas Company's (together, the "Companies") Value Plus Installer Program (the "VPI Program") is anti-competitive and seeking a Department order immediately discontinuing the Program. On August 10, 2000, the Companies filed a Motion to Dismiss the Complaint and Petition of the Massachusetts Oilheat Council, Inc. and the Massachusetts Alliance for Fair Competition ("Motion to Dismiss"), which was accompanied by a Memorandum in Support of the Motion to Dismiss (the "Memorandum"). On September 7, 2000, the Petitioners filed a Memorandum in Opposition to the Motion to Dismiss (the "Memorandum in Opposition"). Pursuant to an inquiry by the Hearing Officer, this Reply Memorandum responds to assertions made by the Petitioners in the Memorandum in Opposition.

The Motion to Dismiss and Memorandum submitted by the Companies on August 10, 2000, requests that the Department dismiss the Complaint and Petition because the various allegations made by the Petitioners, even if factually correct, which the Companies do not concede, fail to present a legal claim that should be heard by the Department. The Companies will not restate the positions taken in the Memorandum and do not intend their silence concerning any specific issue to reflect agreement with the position taken by the Petitioners. Rather, the Companies submit this Reply Memorandum in order to address certain assertions made by the Petitioners in their response to the Motion to Dismiss. As set forth below, the Petitioners' response fails to overcome the deficiencies of the Complaint and Petition and underscores the Companies' position that no action by the Department is warranted, necessary or appropriate in relation to the Companies' VPI Program.

II. REPLY COMMENTS

The Petitioners make three primary arguments in opposition to the Motion to Dismiss: (1) that the Companies' Motion to Dismiss is founded upon a claim that the Department does not have jurisdiction to entertain the complaint/petition; (2) that the VPI Program creates ratemaking issues that should be addressed by the Department outside the context of a ratemaking proceeding; and (3) that the Department should

investigate the participation of ServicEdge Partners, Inc. ("ServicEdge"), despite the fact that the Petitioners are not alleging a violation of the Department's standards of conduct and have failed to comport with established procedures for resolution of such issues.

As an initial matter, the Petitioners mischaracterize the basis of the Companies' Motion to Dismiss. The Companies' Motion to Dismiss is founded upon a claim that, even if the facts alleged are true, action by the Department is unwarranted and unnecessary, rather than a claim that the Department does not have jurisdiction. The Petitioners concede that, in making this filing, they rely only upon the general supervisory authority of the Department under G.L. c. 164, §§ 76 and 76A for the basis of Department action, rather than a specific statutory or regulatory requirement that would mandate or warrant Department action (Motion in Opposition at 4-5). Therefore, the Petitioners pose not a complaint, but rather are petitioning the Department for a broad investigation of a series of unsupported allegations regarding the Companies' VPI Program.

As discussed in the Companies' Motion to Dismiss and Memorandum, there is no basis warranting an investigation by the Department in relation to the VPI Program. The claims that the Petitioners would have the Department "investigate" involve either issues in which the Department does not traditionally get involved, such as antitrust concerns, or involve issues that the Department reviews only in the context of specific ratemaking or other regulatory proceedings, which are not implicated here.

For instance, many of the Petitioners' claims involve the so-called "utilization" or "diversion" of ratepayer funds. However, there is no basis for Department action on ratemaking issues in the absence of a request for ratemaking treatment and outside the context of a ratemaking proceeding that involves such issues. Boston Gas operates under a performance-based ratemaking plan approved by the Department. Boston Gas Company, D.P.U. 96-50 (Phase I) (1996). Both Colonial Gas and Essex Gas operate under ten-year rate freezes approved by the Department in Eastern/Colonial Acquisition, D.T.E. 98-128 (1999) and Eastern/Essex Acquisition, D.T.E. 98-27 (1998). Although the costs of the VPI Program are similar to the costs that the Companies incur for other marketing programs, the Companies are not now proposing any ratemaking treatment for these costs and anticipate that any issues involving such a request would be resolved in a future rate proceeding. It is well established that the Department sets rates based on the costs that are demonstrated by the utility to be necessary and appropriate in providing utility service to customers. Expenditures associated with marketing programs, such as the VPI Program, represent an appropriate exercise of management discretion in the day-to-day operation of the utility. The inclusion of such expenditures in the cost of service (upon which rates are set), therefore, is a ratemaking issue, which is appropriately investigated by the Department in a future ratemaking proceeding. Because the ratemaking implications of the Companies' expenditures is not an issue appropriate for investigation outside of the context of a ratemaking proceeding, there is no basis for Department action on these claims.

Similarly, no action by the Department is warranted on issues relating to the participation of ServicEdge in the VPI Program because the Department has, by regulation, established a framework for resolving issues relating to the potential for anti-competitive practices between a utility and its competitive affiliate. To deal with this potential, the Department has encouraged utilities to organize competitive affiliates as separate corporate entities and has established standards of conduct to govern the relationship between the utility and its affiliate. Order Commencing Rulemaking on Standards of Conduct, D.P.U. 96-44, at 5 (1996). The Department has not barred utilities from transacting business with their competitive affiliates, nor has the Department been willing to impose restrictions upon those transactions that would "handicap" a utility's competitive affiliate in relation to other competitors in that market. See, e.g., Standards of Conduct, D.P.U./D.T.E. 97-96, at 12 (1998). As a result, the mere fact that ServicEdge is participating in the VPI Program, or that ServicEdge may be the largest participating contractor,(1) is not a basis for Department investigation, i.e., there is no anti-competitiveness

inherent in ServicEdge's participation. Any claim of "anti-competitive" effects stemming from ServicEdge's participation represents an allegation that ServicEdge is receiving undue or inappropriate preferential treatment from the Companies, which is a matter governed by the Department's standards of conduct. No such violation is alleged here, and even if it were, the Complainants have failed to follow the procedures established for resolution of such issues.(2) Therefore, there is no basis for Department action on these claims.

Moreover, there is no basis for the Department to require the Companies to provide customers with a "full disclosure and payback analysis" (Memorandum in Opposition at 3). Imposing a requirement on the Companies that they provide customer's with a "full disclosure and payback analysis" suggests that there is something inherently misleading in soliciting a customer's conversion to gas service. The Companies compete in the marketplace to provide customers with heating fuel and, unless there is a claim that the Companies are engaging in unfair or deceptive advertising to induce customers to convert gas, the Companies should be free to market their product on the same footing as other competitors in the marketplace. In that regard, it is reasonable and appropriate for the Companies, and for the Department, to assume that customers are analyzing their service options based on the criteria that are important to them and are making an "informed and intelligent choice" in converting to natural-gas service (see, Memorandum in Opposition at 12).

Significantly, the Petitioners concede that they are not alleging that the Companies are engaged in any unfair or deceptive advertising practices and that they are not alleging antitrust claims (Memorandum in Opposition at 5). To the extent that the Petitioners were to make allegations of unfair or deceptive advertising, and to the extent that the Petitioners are requesting investigation of general claims regarding the anti-competitiveness of a particular marketing program, the Department has traditionally refrained from taking action on such matters because the law provides for recourse through other forums. See, e.g., D.P.U./D.T.E. 97-96, at 24-25; G.L. c. 93A § 2; 940 C.M.R. § 3.01 et seq. (covering unfair methods of competition and unfair or deceptive acts or practices).

III. CONCLUSION

As stated above, the "Complaint and Petition" filed by the Petitioners is not a complaint, but rather is a request for an investigation of issues that are reviewed only in the context of specific ratemaking or other regulatory proceedings, which are not implicated here or involve issues in which the Department does not traditionally become involved. As a result, the Petition provides no basis for the Department to commence and conduct an investigation. Therefore, for all of the above-cited reasons, and the reasons stated in the Companies' Memorandum, the Department should grant the Companies' Motion to Dismiss.

Respectfully submitted,

BOSTON GAS COMPANY

COLONIAL GAS COMPANY

ESSEX GAS COMPANY

By their attorney,

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Catherine L. Nesser

Associate General Counsel

Boston Gas Company

One Beacon Street

Boston, Massachusetts, 02109

(617) 723-8400

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1 The Companies do not concede that this assertion is true, but consistent with the standard for dismissal, are assuming it to be true.

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2 The Petitioners erroneously suggest that it would be futile to follow the dispute-resolution procedures established by the Department, because such a dispute is placed solely in the hands of the Companies (Memorandum in Opposition at 15). However, the Companies have on file with the Department a dispute-resolution procedure that provides for submission of a dispute to the American Arbitration Association (Letter to the Department, February 26, 1999).